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No. 92-690

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

VS.

LAWRENCE J. ANGLIM,
Respondent.

Petition for a Writ of Certiorari to
The Supreme Court of Missouri

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERT F. RITTER
JOSEPH L. WALSH, III*
GRAY & RITTER, P.C.
701 Market Street
Suite 800
St. Louis, Missouri 63101
(314) 241-5620

Counsel for Respondent

*Counsel of Record

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

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SUMMARY OF ARGUMENT

A writ of certiorari may not be granted in this case because there is no error of the trial court that has been preserved for review, and the Missouri Supreme Court's decision in this case is not contrary to any decision of this Court. Petitioner seeks to invoke the Court's jurisdiction by alleging a conflict among the federal circuits as to whether testimony on present value concepts must be adduced in the plaintiff's case in chief, in cases brought under the Federal Employer's Liability Act, 45 U.S.C., Sec. 51 et seq. ("FELA"). As will be discussed herein, this

conflict is a manufactured one, and in no way supports granting a writ of certiorari. Only two Third Circuit cases even suggest that this may be required, and in neither case was the jury given a present value instruction proposed by the defendant as in the case at bar. Further, in each case the defendant made its objection to future damages to the trial court.

In the case now before the Court, the jury not only was instructed on present value, but was given an instruction proffered by Petitioner. This instruction recognized the jury's discretion to award future wage loss. Petitioner asked the trial court for nothing more than the instruction that was given. Petitioner did not make a specific motion for directed verdict or seek a withdrawal instruction on damages. After verdict, however, Petitioner raised, for the first time, an argument that Respondent failed to make a submissible case for future wage loss because he did not introduce expert testimony regarding annuity tables, discount rates, inflationary trends, and the like.

Petitioner has not cited a case, and research has not uncovered one, in which a trial judge instructed the jury properly on present value, and the verdict was later overturned on appeal for a plaintiff's failure to introduce evidence of present value. Further, it is required in the federal courts and in Missouri that a defendant, perceiving error in the trial court, must call it to the trial court's attention in order to preserve the point for appeal. This Petitioner failed to do.

The Court has cautioned against the undue prolonging of injury trials by complicated, detailed testimony on the inexact science of present value. The Court has also expressed its confidence in juries' understanding of the earning power of money and the history of inflation and interest rates over the years. The Court has never declared that all FELA plaintiffs must introduce expert economic testimony to support his or her claim for damages. Likewise, defendants in FELA cases are free to

offer evidence on present vale, and to require a proper present value instruction. There is simply no basis for the relief Petitioner now seeks.

The case before the Court is not a proper one in which to decide whether present value data is mandatory in all injury trials. The Court has never excused the party requesting certiorari from presenting its position to the trial court in the first instance. The days of "trial by ambush" are gone from the federal and state courts. For the Court to grant certiorari on the record in this case would be to condone "appeal by ambush." A defendant, knowing full well that no present value evidence was adduced, could submit a present value instruction in hopes of keeping the verdict down, and then save its submissibility argument for the court of appeals.

No issue is raised by Petitioner that justifies the Court's writ of certiorari.

ARGUMENT

A. There Is No Conflict Among The Circuits On The Issue Of Present Value That Justifies This Court's Writ Of Certiorari; No Case Has Held That, When A Jury Is Properly Instructed On The Issue, The Verdict Can Be Overturned For Failure To Make A Submissible Case On Future Damages, And No Case Has Held That A Defendant Who Proffers A Present Value Instruction May Later Claim No Evidence Supported The Instruction

Petitioner admits that at trial it did not put on evidence of present value, move for a directed verdict as to future damages, or even argue damages in its closing argument to the jury. It is easily inferred from the petition for writ of certiorari that there was no serious challenge to Respondent's proof of future wage loss. As Petitioner states: "Anglim was unable to work after September 1987." Petition, at 3. Recognizing the likelihood that future damages would be awarded, Petitioner tendered the present value instruction set out in its petition, at 4. The trial court gave this instruction without modification. Petitioner requested no more specific instruction than the one given. Respondent's counsel discussed future wage loss and future pain and suffering during closing argument, without objection by Petitioner's counsel. After trial, Petitioner argued for the first time that Respondent's failure to introduce present value evidence was fatal to his claim for future damages.

It is against this background that the issues raised by Petitioner must be reviewed. As will readily appear, Petitioner's argument truly is unique, in that no railroad defendant has ever argued successfully that the plaintiff failed to make a submissible case on future damages, after failing to raise the claim before the trial court, and after requesting and receiving a present value instruction.

There is no question that the proper measure of future damages in a case brought under the FELA is the present value of the future loss. *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485 (1916). It is also clear that the failure to instruct on present value, after a proper request to do so, is error. *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985). Moreover, the Court has declared that reducing future loss to present value is a function relegated to the jury, and the trial court must not preempt the jury's function. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988). The Court has carefully refrained from establishing rigid present value calculations for use in all federal trials. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 546 (1983).

What the Court has never declared, and what Petitioner seeks, is a requirement that in any FELA case, a plaintiff seeking future lost wages, pain and suffering damages, or both, must provide the jury with statistics, charts, mathematical tables and economic forecasts on the issue of present value. Respondent submits this request by Petitioner is unwarranted and unwise, and would go a long way toward converting an injury trial into a "graduate seminar on economic forecasting." *Pfeifer*, 462 U.S. at 548.

Courts have held uniformly that as long as the jury is properly instructed by the trial judge, no specific type of present value evidence is mandated. The genesis of this rule is in *Louisville & N. R. Co. v. Holloway*, 246 U.S. 525, 38 S.Ct. 379 (1918). In *Holloway*, an FELA wrongful death action, the defendant railroad offered evidence of annuity tables utilizing six and seven percent as the discount rate. The trial court refused defendant's proposed instruction that would have required the jury to use the prevailing interest rate in Kentucky, six percent. Rather, the court stated that the jury's verdict should fairly and reasonably "compensate" the widow. 38 S.Ct. at 380.

The Court noted that the defendant had the right to require a specific present value instruction, but failed to exercise that right in the trial court. Further, the Court held that the jury was not misled by the instruction requiring it to "compensate" the widow for the loss of benefits she would have received but for her husband's death. The Court indicated that the jury readily understood the concept of "compensation," and that the instruction "did not imply that the verdict should be for the aggregate of the several benefits payable at different times, without making any allowance for the fact that the whole amount of the verdict would be presently paid at one time." 38 S.Ct. at 380. In *Western & Atlantic R.R. v. Hughes*, 278 U.S. 496 (1929), the Court reinforced the rule that when an FELA defendant is aggrieved by a trial court's general charge on damages, it is incumbent upon the defendant to request a more specific charge.

The court in *Pennsylvania Railroad Company v. McKinley*, 288 F.2d 262 (6th Cir. 1961), construed *Holloway* to mean precisely that "a jury, unaided by specific testimony as to money values, could themselves, being told that the award should be only money value," properly reduce the award to present value. *Id.* at 265. Importantly, the *McKinley* court also noted that jurors are presumed to be aware of the earning value of money when placed in safe investments. *Id.*

In *Duncan v. St. Louis - San Francisco Railway Company*, 480 F.2d 79 (8th Cir.), *cert. denied*, 414 U.S. 859 (1973), the defendant argued plaintiff should not be allowed future lost wages because there was no evidence on how to compute their present value. Despite defendant's failure to request an instruction to this effect the trial court instructed the jury as follows: "The award of damages for the loss of contributions from future earnings, if any, must be reduced to its present cash value and adequate allowance must be made for the earning power of money." *Id.* at 87. The Eighth Circuit held this was proper and adequate, even in the absence of present value evidence.

Likewise in *Heater v. Chesapeake & Ohio Railway Co.*, 497 F.2d 1243 (7th Cir.), *cert. denied*, 419 U.S. 1013 (1974), neither defendant nor plaintiff introduced evidence suggesting a method for computing present value. The court instructed the jury that it was not to simply multiply plaintiff's damages by the number of years he would live, but should determine the "present cash value" of such damages. The court explained the concept of present value in its instruction. *Id.* at 1249 n. 3. The Seventh Circuit, following *Duncan* and *McKinley*, held the instruction was sufficient, even in the absence of evidence on the point. The court also noted that it was the *defendant's* obligation to submit an instruction explaining computation of present value, if it wanted the jury to consider this. *Id.* at 1250.

Finally, in *Bonura v. Sea Land Service, Inc.*, 505 F.2d 665 (5th Cir. 1974), the court aligned itself with the *Heater*, *Duncan* and *McKinley* courts in declaring that actuarial and mathematical evidence was not an absolute prerequisite to the submission of an instruction on lost future wages when evidence of such a loss had been presented. *Id.* at 669.

Despite this uniformity among the circuits, Petitioner argues that two cases from the Third Circuit, *Ballantine v. Central Railroad of New Jersey*, 460 F.2d 540 (3d Cir.), *cert. denied*, 409 U.S. 879 (1972); and *DiSabatino v. National Railroad Passenger Corp.*, 724 F.2d 394 (3d Cir. 1984), require the Court to grant a writ of certiorari in this case. These cases are readily distinguishable from the case before the Court.

In *Ballantine*, the court stated that once plaintiff sought damages for future losses, the jury was "entitled" to receive evidence and guidance on methods of reducing lost earnings to present value. 460 F.2d at 544. Yet as to the defendant's entitlement in defending the claim of future loss, the court quoted with approval from *McWeeny v. New York, NH & H.R. Co.*, 282 F.2d 34, 40 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960) (Lumbard, J., dissenting):

> "The defendant is entitled to a *charge* which will direct the jury's attention to every item and consideration which may substantially reduce the plaintiff's loss so that the jury does not charge the defendant with a loss which the plaintiff would never have to suffer. Even handed justice requires nothing less than this." (emphasis added)

The trial court in *Ballantine* had given only a general instruction on "present worth," which gave the jury no guidance on reducing the plaintiff's *future* lost wages to present value. The instruction was given over defendant's vehement objection, unlike in the case at bar, where the defendant *proposed* the instruction. All *Ballantine* holds is that the jury must be guided in some proper manner, and this guidance could be given by appropriate jury charge or instruction. In light of the detailed present value instruction now provided in *Devitt, Blackmar & Wolff*, Sec. 85.13, and the Court's admonition against trials becoming "graduate economic forecasting seminars," *Monessen*, 486 U.S. at 341, a proper present value instruction to the jury is all the Third Circuit would require. Here, Petitioner obviously cannot contest the instruction given by the trial court, since Petitioner drafted and tendered the instruction. Even handed justice requires that Petitioner — rather than Respondent — bear responsibility for any perceived deficiencies in the present value instruction.

In *DiSabatino*, the plaintiff convinced the trial court not to instruct the jury on present value at all. 724 F.2d at 395. Thus, it is impossible to predict what the court would have done had the jury been given guidance by the trial court on present value. *Cf. Brown v. Chicago & North Western Transp.*, 162 Ill. App. 3d 926, 516 N.E.2d 320, 330 (1987) ("*DiSabatino*, however, stands only for the indisputable proposition that the failure to give an instruction on reduction of future lost earnings to present worth was reversible error.").

Moreover, the railroad defendants in *Ballantine* and *DiSabatino*, as well as the defendant in *Reusch v. Seaboard System R.R.*, 566 So.2d 489 (Ala.), *cert. denied*, __ U.S. __, 111 S.Ct. 581 (1990) took the critical step of voicing their objections on future damages to the trial court. Petitioner completely failed to do this. Beyond question, had this case proceeded through a federal court in the Third Circuit, Petitioner would be held to have waived any complaint on present value. *See Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453, 457 n.1 (3d Cir. 1982), *rev'd*, 462 U.S. 523 (1983) (Appellant must demonstrate (a) specific acts or omissions by trial court constituting legal error, (b) properly suggested as error to the trial court along with suggestions of appropriate action, and (c) if uncorrected at that level then properly presented for review to the appellate court.)

Petitioner mistakenly suggests that the United States Court of Appeals for the Second Circuit has "joined" with the Third Circuit in requiring a plaintiff to introduce evidence of the present value of his future losses in order for the jury to consider the issue. In support of its contention, Petitioner cites *DeChico v. Metro-North Commuter Railroad*, 758 F.2d 856 (2d Cir. 1985). The only pertinent issue in *DeChico* was whether the trial court erred in refusing to instruct the jury on the effects of inflation when the court gave its present value instruction. According to the court of appeals, the trial court erred in holding that inflation only impacts future *lost wages* — which plaintiff did not seek — and not future pain and suffering. 758 F.2d at 860.

The *DeChico* trial court charged the jury on present value even though "*neither party* had offered any evidence relating to the proper discount rate or to an adjustment for inflation. . ." (emphasis added). Thus, *DeChico* clearly refutes Petitioner's argument that present value evidence is a prerequisite to an award of future damages. The court condoned the giving of a present value instruction as to future pain and suffering, *id.* at 860, condemned the failure to require the jury to consider

inflation, *id.*, and essentially considered unimportant the fact that no present value evidence was adduced. *Id.* at 859.

Petitioner's statement, petition at 8, that the state courts of Montana and Oregon require evidence of the present value of lost future wages before the jury can consider the issue, also is not true. A cursory reading of *Resner v. Northern Pacific Railway*, 161 Mont. 177, 505 P.2d 86 (1973), and *Plourd v. Southern Pacific Transportation Co.*, 513 P.2d 1140 (Ore. 1973), reveals that substantial evidence on inflation, discount rates and present value was adduced in each case. While the courts clearly held that such testimony was *admissible* — a point Respondent herein does not dispute — they do not declare that such evidence is *required.*

All the Court has required in this context is that if the defendant in an FELA case requests an instruction on present value, it must be given, *Dickerson*, 470 U.S. at 413, and that in requiring the jury to reduce the verdict to present value, the trial court must not *preempt* the jury's function. *Monessen*, 486 U.S. at 342. The Court stated in *Monessen*:

> We do not mean to suggest that the judge in an FELA action is foreclosed from assisting the jury in its present value calculations. Indeed, because "'[t]he average accident trial should not be converted into a graduate seminar on economic forecasting,'. . .the judge has an obligation to prevent the trial proceedings on the present value issue from becoming unnecessarily prolonged and the jury from becoming hopelessly mired in "difficult mathematical computation." It is therefore permissible for the judge to recommend to the jury one or more methods of calculating present value so long as the judge does not in effect preempt the jury's function. A trial judge's instructions to the jury with regard to discount methods — provided that they do not "subject the jury's estimate to . . . rigid mathematical

> limitatio[n]," . . . —are entitled to substantial deference on appellate review.

Id. at 341-42 (citations and footnotes omitted).

Finally, despite Petitioner's suggestion to the contrary, the Court's *Pfeifer* Opinion neither requires specific present value evidence nor places a burden of producing such on the plaintiff. The Court limited its attention to actions brought under Sec. 5(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Sec 905(b). *Pfeifer*, 462 U.S. at 547. The Court declined to establish an exclusive method for computing present value, and the reasons for this hesitation are clear.

Litigants must retain some freedom in deciding how complicated and prolonged they wish their injury trials to be. Counsel may wish to "forego the time and expense involved in proving inflationary trends and discount rates in trials involving lost future wages." *Kokesh v. American Steamship Co.*, 747 F.2d 1092, 1096 (6th Cir. 1984). While some parties may desire extensive present value testimony to bolster their future wage loss claim, others may prefer a properly worded, easily understood jury instruction. The courts that have addressed the issue have held that this is sufficient. Certainly, at trial Petitioner felt a present value instruction was sufficient. Nothing in this Court's precedent requires more, nor should such a requirement now be established for a submissible case of future damages. The application for writ of certiorari should be denied.

B. The Court May Not Exercise Its Writ of Certiorari Because Petitioner Failed To Present Its Argument To The Trial Court In The First Instance, Failed To Challenge Submissibility Of The Plaintiff's Case For Future Damages, And Presented Its Own Instruction On Present Value

Respondent submits that there is no reasonable basis for issuing a writ of certiorari in an FELA case for the purpose of

reviewing the status of present value evidence. However, even if the Court were inclined to review the issue, clearly this is not a proper case.

While federal law governs the substantive rights of the parties under FELA actions including the right to proper instructions on damages, the law of the forum controls procedural and evidentiary matters. *Kelly*, 241 U.S. 485; *Eickelman v. Illinois Cent. Gulf R. Co.*, 714 S.W.2d 611 (Mo. App. 1986). In the case below, Defendant did not move to exclude evidence of future damages, move for directed verdict on the specific issue of future damages, seek a withdrawal instruction on the issue, or proffer a specific, detailed jury instruction either excluding the claim of future losses or giving a present value formula. In fact, Petitioner at trial received all the relief on the issue that it requested, i.e., Petitioner submitted and the trial court gave a present value instruction. In Missouri, a party will not be heard to complain on appeal about an instruction it offered. *Bonnot v. City of Jefferson City*, 791 S.W. 2d 766, 771 (Mo. Ct. App. 1990).

As in the federal courts, litigants in Missouri must make known to the court the action they wish the court to take and provide reasons therefor. *Mo. Rev. Stat.* Sec. 510.210 (1986). A party suggesting it is entitled to a directed verdict must alert the trial court to the grounds for the motion in order for the issue to be preserved for appeal. *Hardy v. Barbour*, 304 S.W.2d 21, 38 (Mo. 1957). It is sufficient if the grounds of the motion are presented to the trial court "in the course of the trial." *Meyer v. St. Louis Public Service Co.*, 253 S.W.2d 525, 528 (Mo. Ct. App. 1952). Here, Petitioner made a motion for directed verdict pertaining solely to its liability. Petitioner never brought its concerns about lack of present value evidence to the trial court's attention.

How then can Petitioner complain to this Court that the trial court failed to take action it was never requested to take?

Petitioner was free to submit as detailed or as narrow an instruction as it deemed necessary to call the jury's attention to the fact that Respondent was receiving in one lump sum wages he otherwise would receive over a period of years. It is one thing for Petitioner to allege that evidence on present value was required to make a submissible case on future wage loss, and that the burden of producing such evidence was on Respondent as the plaintiff in the case. It is quite another thing to state that Petitioner, fully aware at trial that data on present value were not adduced, could then request the trial court to instruct the jury on present value and later claim no evidence supported the instruction.

Further, Petitioner's disingenuous, after-the-fact argument is crystallized in the first sentence of the present value instruction: "If you find in favor of plaintiff and *decide to make an award* for any loss of earnings in the future,. . ." Petitioner's App. A at A-16 (emphasis added). By tendering this instruction, Petitioner explicitly recognized that the jury could award future losses under the law and the evidence in the case. Nowhere in the record is there a proposed instruction which states: "Now you cannot award damages to the plaintiff in this case for any future lost earnings or loss of earning capacity," *Reusch*, 566 So.2d at 491, nor is there any suggestion by railroad counsel that the jury should not be charged "as to future wage loss and reducing to net worth because there has been no evidence to enable this jury to reduce future wage loss to present worth," *Ballantine*, 460 F.2d at 542, nor even a simple motion to preclude the jury's consideration of future lost earnings, *Gorniak v. National R.R. Passenger Corp.*, 889 F.2d 481, 485 (3d Cir. 1989). Also, this certainly is not a case in which the plaintiff convinced the trial court not to give a present value instruction. *DiSabatino*, 724 F.2d at 395. To the contrary, the trial court did exactly what Petitioner wanted it to do when it instructed the jury on present value.

Nothing in prior decisions of this Court even suggests that plaintiff *always* has the burden of adducing actuarial testimony

and annuity tables. The Court in *Holloway*, 246 U.S. 525, criticized the defendant for failing to tender a specific present value instruction, and instead taking a rigid stance on a state maximum interest rate. It seems clear from *Monessen* that neither party adduced evidence on present value. Clearly, the defendant had not, *see* 486 U.S. at 1853 (O'Connor, J., dissenting); *see also Morgan v. Monessen Southwestern Ry.*, 489 A.2d 254, 259 (Pa.Super. 1985), *rev'd*, 486 U.S. 330 (1988). Still, the Court held that the jury should have been instructed to reduce future damages to present value. 486 U.S. at 342. Several courts have held that the defendant, as the party with an interest in reducing the plaintiff's damages, has the burden of producing present value evidence if it wants a specific present value instruction. *See Alma v. Manufacturer's Hanover Trust*, 684 F.2d 622, 625-26 (9th Cir. 1982); *Aldridge v. Baltimore & Ohio R. Co.*, 789 F.2d 1061 (4th Cir. 1986); (*Aldridge I*) *aff'd*, 814 F.2d 157, 159 (4th Cir. 1987) (Phillips, J., concurring) (*Aldridge II*), *rev'd*, 866 F.2d 111 (4th Cir. 1989) (*Aldridge III*).

The effect of a record without present value data was considered by Judge Phillips in the en banc *Aldridge* opinion:

> [F]ailure to produce any specific evidence on the issue should have the normal effect of disentitling a party to any *specific* instructions on the issue. In some cases, this might require instructions specifically favorable to only one of the parties, where only one party produced evidence on the issue. In others, it might disentitle both parties to any specific instructions on the method of converting to present value. In the latter situation, however, both parties would still be entitled upon request, to a general instruction that in computing any amount due for lost earnings the award should be for present value. That is what *Dickerson* seems to me unmistakably to hold, but I think that is all it holds. The fact that the *Dickerson* court referred only to defendant's

> entitlement simply reflects the fact that it was the defendant in that case (as normally it would be) who objected to the failure to give any instruction on the issue.

814 F.2d at 159 (Phillips, J., concurring) (emphasis in original).

The Court recognized in *Monessen* that injury trials should not become "graduate seminars on economic forecasting." 486 U.S. at 341 (quoting *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30, 39 (2d Cir. 1980), *cert. denied*, 451 U.S. 971 (1981). Petitioner downplays this scenario, and in its petition, at 12, directs the Court to a present value calculation that has no support in this record. Petitioner makes a further, non-record observation, *id.* at 11, that the current "real interest rate" is closer to 4%.

Petitioner's figures conveniently leave out the effects of inflation and wage increases, and purport to prove a "windfall" to Respondent. Petitioner's hypothetical, *id.* at 12, n. 1, reflects how easily injury cases become graduate economics seminars. Had the trial court used the "total offset method," which the Court did not disavow in *Monessen*, *see* 486 U.S. at 354 (O'Connor, J., dissenting), the verdict for Respondent may well have been the verdict that was rendered.[1] Had a 1% discount rate been utilized, the plaintiff's verdict would have been larger than if a 6% discount rate were used. Surely in any trial where the plaintiff's economist uses a 1% discount rate or the total offset method, the defense attorney will do one of two things. Either he will cross-examine the plaintiff's witness by asking him to

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[1] As the Missouri Supreme Court noted below, the jury in this case returned a general verdict, as required under Missouri procedure. Mo. R. Civ. P. 71.02. Thus, it cannot be stated that the jury "straight-lined" Respondent's lost wages since Respondent's losses were not purely economic. The jury may well have discounted Respondent's future wage loss and rendered a higher award for the pain and suffering Respondent endured during his numerous surgical procedures and concomitant disability.

discount future wage loss by a higher discount rate, and then argue the lower wage loss calculations to the jury in closing argument, or he will hire his own economist to testify. Thus, the battle over economics is waged, and the injury trial is unduly prolonged.

Petitioner's economics lesson comes too late. Had it wanted to use the figures now appearing in its petition for writ of certiorari, it should have brought them to the trial court's attention. Instead, Petitioner was content with a general present value instruction. This Court should not relieve Petitioner of its election, and none of the cases cited by Petitioner require the court to do so. No case has held that a defendant can successfully claim on appeal that the plaintiff did not make a submissible case for future wage loss after the defendant:

1) Failed to object to evidence on future wage loss;

2) Failed to move for directed verdict on the issue of future wage loss;

3) Failed to adduce present value evidence;

4) Invited the jury to consider future wage loss by proffering a present value instruction; and

5) Received everything it requested from the trial court.

Had Petitioner raised the issue of submissibility of a claim for future lost wages to the trial court, the case may have come to this Court with a dramatically different record. Faced with a motion to exclude future wage loss as part of his damages, Respondent may have sought to reopen the record for the sole purpose of adducing present value evidence, or stipulated to an appropriate discount rate. The trial court, in addressing such a specific motion for directed verdict, may have consulted the authorities Petitioner now cites in its petition for writ of certiorari. In this way, the court could have explained the reasons for its decision.

It also could have taken judicial notice of a particular present value table.

Further, the court could have decided to give a more detailed present value instruction than the one tendered by Petitioner. Depending upon the disposition of the motion, Respondent obviously would have tailored his closing argument to comport with the jury instructions. In Missouri, jury instructions are read before the argument of counsel. *State ex rel. State Highway Com'n v. Zahn*, 633 S.W.2d 185 (Mo.App. 1982). Because Petitioner failed to make a proper motion, and in fact submitted a present value instruction indicating the jury could award future damages, Respondent reasonably believed future wage loss and pain and suffering were fair topics of argument. It was incumbent upon Petitioner to raise its objection to future damages well before the verdict was returned by the jury. Its failure to do so precludes exercise of the Court's writ of certiorari.

CONCLUSION

The Court's writ of certiorari is not used to resolve hypothetical or contrived disputes. Petitioner points up three cases completely dissimilar to the case at bar, *Ballantine, DiSabatino* and *Reusch,* and suggests this case should be governed by the "rule" announced in those decisions. What Petitioner fails to state is that those three cases came to the appellate courts with complete records of action requested of the trial court, specific action taken by the trial court and, usually, an explanation by the trial court for its action.

No such record is present in this case. To the contrary, here the trial court was not requested to do anything other than what it did. Further, even if Petitioner had properly presented the issue to the trial court, there is no basis in FELA jurisprudence for the rule it now seeks. *Kelly* states that the proper measure of future damages is their present value. *Dickerson* holds only that when a defendant requests a present value instruction it must be given.

Monessen declares that in instructing the jury on present value the trial court must not preempt the jury's function of determining the plaintiff's damages. Nothing that occurred below runs counter to these decisions. The jury was instructed that the proper measure of Respondent's future losses was their present value, and the jury must be presumed to have carried out its duty.

Despite the Court's careful avoidance of rigid, inflexible present value requirements, as reflected by *Pfeifer,* Petitioner seeks a decree that in *all* FELA cases complex economic data must be introduced, and that in *all* such cases the plaintiff must present the data. The Court's FELA decisions, and those of the courts of appeal, suggest that such a decree is unwarranted and unwise.

The petition for a writ of certiorari must be denied.

Respectfully submitted,

Robert F. Ritter
Joseph L. Walsh, III*
GRAY & RITTER, P.C.
701 Market Street
Suite 800
St. Louis, Missouri 63101
(314) 241-5620

Attorneys for Respondent
Lawrence J. Anglim

*Counsel of Record

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